IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 394 OF 1985.

Vithal Pandurang Gurasale. .... Appellant.

Versus.

1. Pandurang Jaysing Salunkhe
(since deceased through LRs.)
1(a) Smt.Leela Pandharinath Salunke.
2(b) Jagannath Pandharinath Salunke.
3(c) Mohan Pandharinath Salunke.
4(d) Sou.Rekha Raju Pawar.
5(e) Sou.Chhaya Hanmant Chavan.
6(f) Sou.Shalan Tatya Chavan.
7(g) Sou.Malan Rama Pawar,
All residents of 632,
Guruwar Peth, Satara,
District: Satara.
2. Bapu Jaysing Salunkhe. .... Respondents.

Shri M.S.Chavan for the Appellant.

Shri P.J.Shinde for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 23rd February, 2005.

ORAL JUDGMENT.

1. On 4th October 1985 this Court admitted the Second Appeal by observing that the interpretation of section 16 of the Specific Relief Act, 1963, (hereinafter referred to as "the said Act of 1963") is the substantial question of law.

2. The Appellant is the original Plaintiff and the

Respondents are the original Defendants. The suit was filed by the Appellant for specific performance of the agreement dated 17th August 1973 for sale of the suit property. As per the terms of the agreement, total consideration was of Rs.3100/-. According to the case of the Appellant a sum of Rs.500/- was paid by him to the Defendant No.1 who executed the said agreement. It is stated by the Appellant that to avoid any technical defence the Respondent No.2 has been impleaded as party. According to the Appellant, the Respondent No.1 started avoiding to execute the sale deed by giving illness of his mother as a pretext. According to the Appellant a further amount of Rs.100/- was paid by him to the Respondent No.1 on 5th November 1973 and on 11th May 1975 a sum of Rs.2000/- was paid by him to the Respondent No.1 when the marriage of the son of Respondent No.1 was to take place. As the Respondent No.1 did not comply with the said agreement, notice dated 19th July 1976 was issued by the Appellant to the Respondent through his Advocate calling upon him to execute the sale deed by accepting balance consideration of Rs.500/-.

3. The defence of the Respondents was that the Respondent No.1 never intended to sell the suit property to the Appellant and in fact the transaction between the

parties was a money lending transaction and the suit agreement was executed by way of security for repayment of the amount advanced by the Appellant to the Respondent No.1.

4. The trial Court rejected the prayer for specific performance. The trial Court, however, granted a decree directing the Respondent No.1 to pay Rs.2500/- to the Appellant with interest thereon at the rate of 6% per annum. The trial Court held that the suit agreement was by way of security for repayment of the amount advanced by the Appellant to the Respondent No.1 and the sum of Rs.2600/- received by the Respondent No.1 was not towards the sale price. In so far as the readiness and willingness on the part of the Appellant is concerned, the trial Court did not decide the said issue.

5. The Appellant challenged the said decree by way of an Appeal before the District Court. The Appellate Court dismissed the said Appeal. The Appellate Court ,however, held that the real nature of the transaction between the parties was agreement for sale and the Respondent No.1 received a sum of Rs.2600/- from the Appellant towards the price under the Agreement for Sale. The Appellate Court held that the Appellant has not complied with the requirement of section 16(c) of

the said Act of 1963 by establishing readiness and willingness. The Appellate Court held that the readiness shown by the Appellant was conditional in the sense that the Appellant offered to pay balance consideration of Rs.500/- and to complete the transaction only on deletion of the entries of the names of the Respondent No.2 and the Respondent No.1's sister Bhimabai. Therefore, the Appellate Court held that there is no readiness and willingness shown by the Plaintiff to perform his part of the agreement as per the terms and conditions incorporated in the suit agreement.

6. Shri Chavan the learned Counsel appearing for the Appellant relying upon various Judgments of the Apex Court submitted that there is a substantial compliance made with the provisions of section 16(c) of the said Act of 1963. He submitted that offer of the Appellant to perform his part of the contract was never conditional as is reflected from the said notice. He submitted that out of the total consideration of Rs.3100/- substantial part of the same i.e. a sum of Rs.2600/- is admittedly paid by the Appellant to the Respondent No.1 and therefore it was obvious that the Appellant was in a position to pay the comparatively negligible amount of Rs.500/-.

7. Shri Shinde appearing for the Respondents submitted that he was desirous of supporting the decree passed by the Appellate Court by contending that the finding recorded by the Appellate Court on the first point for determination should have been recorded in favour of the Respondents. He has taken me through the Judgment of the trial Court which records categorical finding that considering the earlier transactions entered into by the Appellant, the suit transaction was not at all a transaction of agreement for sale. When a doubt was expressed regarding the right of the Respondents to make the said submission in view of a recent Judgment of this Court, Shri Shinde placed reliance on various Judgments of the Apex Court a reference to which will be made at a later stage and submitted that without filing any cross objection, in view of the express language of Rule 22 of Order XLI of the Code of Civil Procedure, 1908, the Respondents were entitled to support the Decree passed in their favour by pointing out that the finding recorded on a particular issue by the Court below was erroneous. He has taken me through the relevant averments made in the plaint and submitted that the averments made therein show that there was no readiness and willingness on the part of the Appellant.

8. Before adverting to the submissions made by the learned Counsel appearing for both the parties, it will be necessary to deal with the contention of Shri Shinde that without filing cross objection, it was open for the Respondents to agitate that a particular finding recorded by the lower Court against the Respondent ought to have been in favour of the Respondent.

9. It is necessary to refer to the provisions of Rule 22 of Order XLI of the said Code. Rule 22 has undergone a change by the Code of Civil Procedure (Amendment) Act 1976 and an explanation has been added by the said amending Act. Order XLII Rule 1 of the said Code provides that the Rules incorporated in Order XLI shall apply to the Appeals from the Appellate Decree. Therefore, Rule 22 of Order XLI of the Code will have application to the Second Appeals also.

10. My attention was invited to a Judgment of the learned Single Judge of this Court reported in 2004 (4) Mah.L.J. page 553 (Dadarao Tukaram Kosare & others v/s. Shyam Cooperative Housing Society Ltd.). The said judgment is rendered in a Second Appeal. The substantial question of law which came up for consideration in the said Second Appeal is as under:

> "Whether the parties succeeding in the trial Court can support the Judgment and Decree passed in their favour without filing a Cross Objection only as regards the findings which are recorded against them by the Court, would be the substantial point for consideration in this appeal."

In paragraphs 6 and 8 of the said Judgment, the learned Single Judge has said:

> "6. The question of law as framed above, is a settled position of law, as conceded by both the parties. The fact of this case nowhere support the appellants on merits itself. **There cannot be any dispute that the party succeeding in the trial Court can support the judgment and decree passed in their favour, but, finding which are against cannot be challenged, without filing the cross objection.** The facts and circumstances of the case however, plays important role while deciding even this aspect. When Court comes to a particular conclusion on merit based on evidence available on record such findings cannot be interfered with, in the

Second Appeal, even if there is some merit in the contention raised. In the facts of this case, on merits itself there is no material placed on record to justify interference.

8. So far as the question of jurisdiction is concerned, there is no dispute that this question can be raised by any party in spite of the fact that there was no such cross objection raised as contemplated by Order 41 Rule 22, even if such question is based on admitted facts and circumstances of the case. However, in the present matter the Appellate Court has considered the question of jurisdiction and accordingly proceeded with the matter by holding that the suit is maintainable in the Civil Court itself. This finding is in fact given by both the Courts. In view of this, I see there is no reason to interfere with the order passed by the learned Appellate Court." (Emphasis supplied.)

11. The question whether a Respondent, without appealing from any part of the Decree and without filing any Cross Objection, while supporting the Decree can

contend that the finding of the Court below on any particular issue ought to have been in his favour is no more res-integra. There are various judgments of the Apex Court on this point. A reference will have to be made to the recent decisions of the Apex Court out of several decisions which have considered the scope of Rule 22 of Order XLI as amended in 1976. In a decision of the Apex Court reported in (2003) 9 S.C.C. page 606 (Banarsi and others v/s. Ram Phal), the Apex Court considered the said issue. The Apex Court has referred to the provisions of Rule 22 which existed prior to the 1976 amendment and has considered the effect of the 1976 amendment and especially with reference to the explanation which was incorporated by 1976 amendment. Paragraphs 10 and 11 of the said Judgment precisely lay down the law on the point, which read thus:

> "10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection

against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

. (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

. (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

. (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the

decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not in person aggrieved by the decree. **Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge in any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection;** the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be

> available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent." (Emphasis supplied).

In another decision reported in AIR 1999 S.C. page 3571 (Ravinder Kumar Sharma v/s. State of Assan & others) the Apex Court has considered the provisions of Rule 22.

In paragraph 22 the Apex Court has said thus:

> "22. In our view, the opinion expressed by Mookerjee J. of the Calcutta High Court on behalf of the Division Bench in Nishambhu Jena's case (1985 (89) Cal.WN 685) and the view expressed by U.N.Bachawat J. in Tej Kumar's case (AIR 1981 Madh Pra.55) in the Madhya Pradesh High Court reflect the correct legal position after the 1976 amendment. **We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the**

> **respondent, for the purpose sustaining the decree to the extent the lower Court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory.** In other words, the law as stated in Venkata Rao's case (AIR 1943 Mah 698) by the Madras Full Bench and Chandre Prabhuji's case (AIR 1973 SC 2565) by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the Amendment." (Emphasis supplied).

By another recent Judgment reported in (2003) 5 SCC page 321 (Postgraduate Institute of Medical Education and Research and another v/s. A.P.Wasan and others), the Apex Court has taken a similar view. Paragraph 26 of the said decision reads thus:

> "26. According to the appellants although they did not prefer a counter-appeal, which they could have done under the Explanation to order 41 Rule 22 of the Code of Civil Procedure, they could nevertheless challenge the finding in Respondent 1's appeal to the

> Division bench. **It may be, as has been held in Ravinder Kumar Sharma v. State of Assam that the Explanation inserted by the 1976 Amendment to Order 41 Rule 22, the Code does not make it obligatory to file a cross-objection against an adverse finding of a lower court and that the respondent could attack such finding in its submissions to the appellate forum.** But in this case, there is nothing to show from the records that the appellants did in fact challenge the finding of the Single Judge before the Division Bench. If they had and the Division bench had not recorded it, it was incumbent on the appellants to have had the matter clarified before the Division Bench particularly when the Division Bench expressly recorded that the appellants had not challenged the finding. (See Chitra Kumari v. Union of India, SCC at p.220)." (Emphasis supplied).

12. The view taken by the Apex court in the aforesaid decision is very clear. When the Judgment and Decree passed by the Court of the first instance is in favour of the Defendant or Plaintiff, in an Appeal preferred by the unsuccessful party, the Respondent can always

canvass without filing cross-objection that a finding on a particular issue ought to have been recorded in his favour and in this manner the Respondent can support the decree. The filing of the cross objection is optional. The question of filing of cross objection arise only when the Respondent desires to challenge any part of the Decree which is against him.

13. For more than one reason, the decision of the learned Single Judge in the case of Dadarao Tukaram (supra) cannot be held as laying down a ratio that a party in whose favour a decree is passed by the trial Court cannot challenge a finding recorded by Trial Court against him without filing a cross objection. Firstly it is to be noted that what is stated by the learned Single Judge in paragraph 6 is clearly on the basis of the concession by the Counsel appearing for the parties. The learned Single Judge in the beginning of the paragraph No.6 has recorded that there was a concession of the settled position of law by Counsel appearing for both the parties. A finding which is rendered on the question of law on the basis of concession by the Counsel appearing for the parties cannot be held as a binding precedent. The Apex Court in a decision reported in (2001) 4 S.C.C. page 262 (Kulwant Kaur v/s. Gurdial Singh Mann) held that:

> "Concession if made and in the event the Court proceeds on the basis of such concession, the decision cannot by any stretch be termed to be a binding precedent and as such the previous decision (Bararsi Dass) does not and cannot have the sanctity and solemnity of a binding precedent."

In paragraph 8 of the Judgment of the learned Single Judge he has held that in so far as the finding on issue of jurisdiction is concerned, the same can be challenged without filing cross objection.

14. Even assuming that what is stated in paragraph 6 of the Judgment of the learned Single Judge can be read as ratio of the Judgment, the same cannot become binding precedent in view of rule of per incurium. The rule of per incurium can be applied where a Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where the Court omits to consider any specific provision while deciding that issue. In a decision of the Apex Court reported in 2000(4) S.C.C. 262 (Govt. of A.P. & another v/s. B.Satyanarayana Rao (dead) by LRs. and others). The Apex Court has held that:

"8. The learned counsel for the respondent attempted to convince us that the decision in the case of State of A.P. v. V.Sadanandam has to be ignored on the principle of per incuriam as certain relevant provisions of the Rules were not considered in the said case, and in any case this case requires to be referred to a larger Bench of three Judges. **The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."** (Emphasis supplied).

Thus in my view the Judgment of the learned Single Judge of this Court in the case of Dadarao Tukaram will not prevent the learned Counsel for the Respondents from making submissions as regards illegality of the findings recorded by the Appellate Court on Point No.1 without filing Cross Objection. The entire decree is in favour of the Respondents and therefore without filing Cross Objection, the Respondents can contend that finding on point No.1 ought to have been recorded in favour of the Respondents. Such a challenge by a Respondent in a

Second Appeal to a finding of the lower Appellate Court will be naturally governed by limitations imposed by section 100 of the Code.

15. The learned trial Judge while deciding the issue regarding the real nature of the suit transaction has referred to the Agreements entered into by the Appellant with other persons for acquiring immoveable property. The trial Court held that the said transactions were money lending transactions. The trial Court also noted that the suit notice was issued nearly after three years from the date of the suit agreement. In paragraph 8 of the Judgment of the Appellate Court, a reference is made to the said earlier transactions entered into by the Plaintiffs. After referring to the said transactions, the Appellate Court held that there was no basis for the said conclusion. A finding has been recorded by the Appellate Court that the suit transaction between the parties must be held to be an agreement of sale. In this connection it is necessary to refer to the averments made in the plaint. In the plaint reliance is placed on notice dated 19th July 1976. The said notice is for calling upon the Respondent No.1 to perform his part of the agreement by executing a conveyance. It is not the case of the Respondent No.1 that a reply was sent to the said notice. If the real transaction

between the parties was something else, the Respondent No.1 would have come out with that case at the earliest opportunity. However, no reply was sent by the Respondent No.1 to the notice. The trial Court was impressed by the fact that the notice is issued nearly three years after the date of execution of the suit agreement. When the Respondent No.1 has not even cared to reply to the suit notice by raising a specific contention that the transaction was a money lending transaction, only on the basis of some other transactions made by the Plaintiff with third parties, the trial Court could not have come to the conclusion that the real nature of the transaction between the parties was different and in fact the agreement was executed by way of security for repayment of the amount advanced by the Appellant.

16. In so far as the issue of real nature of transaction is concerned, it is a question of fact which is required to be decided on the basis of the evidence on record. After consideration of the evidence on record and pleadings, the Appellate Court has recorded a finding of fact in favour of the Appellant. As the said finding of fact is not concurrent, I have examined the pleadings, the notes of evidence and documents on record. I find that the view taken by the Appellate

court is a possible view to be taken on the basis of evidence on record. It is not open in a Second Appeal under section 100 of the said Code to interfere with the said finding on the ground that some other view is possible to be taken.

17. In so far as the readiness and willingness is concerned, a reference will have to be made to certain decisions of the Apex Court relied upon by Shri Chavan, the learned Counsel appearing for the Appellant. In a decision reported in AIR 2000 SC page 2408 (Motilal Jain v/s. Smt.Ramdasi Devi & ors.) The Apex Court has held that an averment of readiness and willingness in the plaint is not a mathematical formula which should be only in specific words. The Apex court held that the averments in the plaint will have to be read as a whole. In the facts of the case before the Apex Court the Plaintiff had parted with 2/3rd of the agreed consideration. In the light of the fact that 2/3rd of the total consideration was paid by the Plaintiff, the Apex Court held that there is no reason why the Plaintiff would not pay balance 1/3rd consideration. In the facts of the present case out of the agreed consideration of Rs.3100/- a total amount of Rs.2600/- has been paid by the Appellant-Plaintiff. Thus what has been paid by the Appellant-Plaintiff is nearly 5/6th of

the agreed consideration.

18. In another decision of the Apex Court reported in (2002) 9 S.C.C. 582 (Pushparani S.Sundaram & others v/s.Pauline Manomani James (deceased) and others), the Apex Court held that the readiness and willingness to perform essential terms of the contract may be gathered from the totality of the circumstances or the conduct of the Plaintiff.

19. In the light of the law laid down by the Apex Court it is to be seen here that the Appellate court has held against the Appellant only on the ground that the Appellant has come out with a case that he was ready and willing to perform his part of the contract only after the name of the Respondent No.2 and his sister Bhimabai were deleted from the revenue record. The Appellate Court has, therefore, held that there was no readiness and willingness to comply with the terms of the agreement as it was not at all a term of the agreement that the sale deed will be executed only after the names of the said persons are deleted.

20. As held by the Apex Court, the readiness and willingness will have to be considered in the light of the totality of the facts and circumstances of the case

on record. In the suit notice dated 19th July 1996 the Appellant has clearly stated that the Respondent No.1 should collect the sum of Rs.500/- within four days and to execute sale deed in favour of the Appellant. In the notice it is not stated that the Appellant is ready and willing to pay the balance consideration only after the names of the other parties are deleted from the revenue record. In paragraph 4 of the plaint an assertion is made that the Appellant was ready and willing to take conveyance after the record was corrected. Shri Shinde relied upon further assertion made in paragraph 4 which states that the Appellant himself avoided to do so. As held by the Apex Court the plaint will have to be read in its entirety. There is a reference in the plaint to the suit notice and the fact that a sum of Rs.2600/- has been paid by the Appellant. Willingness is shown by the Appellant to deposit the sum of Rs.500/- in the Court. It is asserted that by sending the notice the Appellant called upon the Respondent No.1 to execute conveyance, but the conveyance has not been executed.

21. The Appellate Court found that a substantial part of the consideration has been paid by the Appellant. Following the decision of the Apex Court in the case of Motilal Jain (supra) there is no reason to hold that the Appellant would not pay the balance consideration which

represents only 1/5th of the agreed consideration. Taking the finding of fact recorded by the Appellate Court in paragraph 11 as it is, it is impossible to agree with the inference drawn by the Appellate Court on the issue of readiness and willingness. Taking the finding recorded by the Appellate Court as it is, if inference is not drawn as per the settled law, interference in a Second Appeal under section 100 of the said Code is permissible. In view of the law laid down by the Apex Court, the Appellate Court should have considered totality of the circumstances on record and therefore, the finding recorded by the Appellate Court on the issue of readiness and willingness will have to be set aside. No doubt it is contended by Shri Shinde that the issue regarding readiness and willingness is purely a question of fact and is not a substantial question of law. However, the Apex Court in a Judgment reported in (1996) 8 SCC page 365 (D.S.Thimmappa v/s. Siddaramappa) has held that in Second Appeal High Court can always interfere with a finding of fact where the First Appellate Court has failed in law to draw proper inferences on proved facts. In the present case as held earlier the inference drawn by the Appellate Court on proved facts is contrary to the law laid down by the Apex Court in the case of Motilal Jain (Supra).

22. The Appellate Court has already held that the real nature of the transaction was an Agreement of sale. The finding on issue of readiness and willingness will have to be in favour of the Appellant. Hence the Appeal succeeds and the following order is passed:

(a) The Judgments and Decrees of the Courts below are quashed and set aside and the suit stands decreed in following terms:

"(i) The Plaintiff is directed to deposit the balance consideration of Rs.500/- in the trial Court on or before 30th June 2005. If the balance consideration is paid within the stipulated period, the Defendant No.1 shall execute a conveyance in respect of the suit property in favour of the Plaintiff. If the conveyance is not executed by the Defendant No.1, it will be open for the Plaintiff to execute the decree and get the conveyance executed by appointing a Court Commissioner.

(ii) In case the Plaintiff fails to deposit

the balance consideration within the stipulated time, the claim for specific performance will stand dismissed and there will be a decree against the Respondent No.1 directing him to pay a sum of Rs.2600/- to the Plaintiff with interest at the rate of 6% per annum from the date of filing of the suit till realisation.

(iii) The Defendant No.1 will pay costs of the suit to the Plaintiff and bear his own."

(b) There will be no order as to costs as far as this Second Appeal is concerned.

(c) Certified copy expedited.

Judge.